

STATE OF MICHIGAN
IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Supreme Court No.

Plaintiffs-Appellees,

Court of Appeals No.: 251110

v

Lower Court Case No.: 01-007289-NH

~~THE MEMORIAL HOSPITAL, a Michigan~~
~~Non-Profit Corporation,~~ d/b/a MEMORIAL
HEALTHCARE CENTER,

Defendant,

AND

RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O.,
and JAMES H. DEERING, D.O., P.C., d/b/a
SHIAWASSEE RADIOLOGY CONSULTANTS,
P.C., Jointly and Severally,

Defendants-Appellants.

dec

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

Willingham & Coté, P.C.

Attorneys for Defendants/Appellants
Michael W. Stephenson (P48977)
Matthew K. Payok (P64776)
333 Albert Avenue, Suite 500
East Lansing, MI 48823
(517) 351-6200
Fax: (517) 351-1195

and

Hackney, Grover, Hoover & Bean

Randy J. Hackney (P28980)
Loretta B. Subhi (P42039)
1715 Abbey Lane, Suite A
East Lansing, MI 48823
(517) 333-0306

FILED

JUL 21 2005

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

129134

APPL

8/16

27997

Gru 6/9/05

Shiawassee

G. Lastracca

TABLE OF CONTENTS

INDEX OF AUTHORITIES	iii
STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT	vi
STATEMENT OF QUESTION INVOLVED	vii
STATEMENT OF FACTS & PROCEEDINGS	1
<i>APSEY I</i>	1
<i>APSEY II</i>	2
GROUND FOR GRANTING LEAVE TO APPEAL	6
ARGUMENT	10
I. THIS COURT SHOULD REVERSE IN PART THE COURT OF APPEALS DECISION IN <i>APSEY II</i> BECAUSE THE <i>APSEY II</i> COURT LACKED THE AUTHORITY TO ISSUE A PURELY PROSPECTIVE ADVISORY OPINION, BECAUSE THERE WAS NO LEGAL BASIS FOR PROSPECTIVE APPLICATION WHEN NO AUTHORITY EXISTED SUPPORTING APPELLEES' POSITION AND WHEN THE DECISION BOUND ALL SUBSEQUENT LITIGANTS, AND BECAUSE THE COURT OF APPEALS WAS POWERLESS TO ACT ON A CASE THAT HAD NEVER BEEN "COMMENCED."	10
A. Standard of review	12
B. <i>Apsey II</i> must apply to appellees, even if it does not apply retroactively to other litigants, or the decision will be an advisory opinion that the Court of Appeals was without power to render	12
C. Alternatively, there is no justification for prospective application here under any circumstances because <i>Apsey II</i> did not change the law or overrule existing authority. Therefore, even if the <i>Apsey II</i> Court had the power to issue a purely prospective advisory opinion, this Court should reverse its attempt to do so here.	14
1. There is "no discrete class of litigants" who would be denied relief if <i>Apsey II</i> were retroactive	15

2.	Appellees had no precedent or other authority to rely on to justify their ignorance of § 2102	16
3.	If not full retroactive effect, <i>Apsey II</i> must be given at least limited retroactive effect to cases where the issue has been raised and preserved	18
D.	Because appellees failed to “commence” this action, the action itself is a nullity, and there was nothing over which the <i>Apsey II</i> Court could exercise jurisdiction. This Court should therefore hold that the <i>Apsey II</i> Court was powerless to do anything but dismiss this case.	19
CONCLUSION		24

INDEX OF AUTHORITIES

Cases

<i>Apsey v Memorial Hospital</i> , ___ Mich App ___; ___ NW2d ___ (2005)	<i>passim</i>
<i>Apsey v Memorial Hospital (On Reconsideration)</i> , ___ Mich App ___; ___ NW2d ___ (2005)	<i>passim</i>
<i>Berkery v Reilly</i> , 82 Mich 160; 46 NW 436 (1890)	6, 16
<i>Browning v Walters</i> , 620 NE2d 28 (CA Ind, 1993)	20
<i>Bryant v Oakpointe Villa Nursing Center, Inc</i> , 471 Mich 411; 684 NW2d 864 (2004)	4, 19
<i>Buscaino v Rhodes</i> , 385 Mich 474; 189 NW2d 202 (1971)	16, 17, 18
<i>Fox v Martin</i> , 287 Mich 147; 283 NW 9 (1938)	21, 22
<i>Geralds v Munson Healthcare</i> , 259 Mich App 225; 673 NW2d 792 (2003)	2
<i>Gladych v New Family Homes, Inc</i> , 468 Mich 594; 664 NW2d 705 (2003)	<i>passim</i>
<i>Haenlein v Saginaw Trades Council</i> , 361 Mich 263; 105 NW2d 166 (1960)	20
<i>Hall v Novik</i> , 256 Mich App 387; 663 NW2d 522 (2003)	14
<i>Hyde v Univ of Michigan Bd of Regents</i> , 426 Mich 223; 393 NW2d 847 (1986)	14, 15
<i>In re Alston's Estate</i> , 229 Mich 478; 201 NW 460 (1924)	7, 16
<i>In re Certified Question</i> , 472 Mich 1225 (2005)	12
<i>Johnson v White</i> , 261 Mich App 332; 682 NW2d 505 (2004)	14
<i>Judicial Attorneys Ass'n v Michigan</i> , 228 Mich App 386, 427;	

579 NW2d 378 (1998), aff'd in part and vacated in part 460 Mich 590; 597 NW2d 113 (1999)	13
<i>Lincoln v GMC (On Remand)</i> , 231 Mich App 262; 586 NW 2d 241 (1998)	15
<i>Lindsey v Harper Hospital</i> , 455 Mich 56; 564 NW2d 861 (1997)	18
<i>McDougall v Schanz</i> , 461 Mich 15; 597 NW2d 148 (1999)	16
<i>Millard v Lenawee Circuit Judge</i> , 107 Mich 134; 64 NW 1046 (1895)	20
<i>Ousley v McLaren</i> , 264 Mich App 486; 691 NW2d 817 (2004)	14
<i>Pohutski v City of Allen Park</i> , 465 Mich 675; 641 NW2d 219 (2002)	11, 15, 16, 18, 23
<i>Poletown Neighborhood Council v Detroit</i> , 410 Mich 616; 304 NW2d 455 (1981)	17
<i>Quality Products and Concepts Co v Nagel Precision, Inc</i> , 469 Mich 362; 666 NW2d 251 (2003)	12
<i>Riley v Northland Geriatric Center (After Remand)</i> , 431 Mich 632; 433 NW2d 787 (1988)	15
<i>Risser v Hoyt</i> , 53 Mich 185; 18 NW 611 (1884)	12
<i>Rose v Nat'l Auction Group, Inc</i> , 466 Mich 453; 646 NW2d 455 (2002)	7
<i>Scarsella v Pollak</i> , 461 Mich 547; 607 NW2d 711 (2000)	19, 20
<i>Sellers v Goldapper</i> , unpublished opinion per curiam of the Court of Appeals, dated November 4, 1997 (Docket No. 196914)	7, 17

<i>Terrien v Zwit</i> , 467 Mich 56; 648 NW2d 602 (2002)	6
<i>Underwood v McDuffee</i> , 15 Mich 361 (1867)	12
<i>VandenBerg v VandenBerg (After Remand)</i> , 253 Mich App 658; 660 NW2d 341 (2002)	2
<i>Wayne Co v Hathcock</i> , 471 Mich 445; 684 NW2d 765 (2004)	<i>passim</i>

Statutes and Court Rules

MCL 600.1901	11, 20, 23
MCL 600.2102	6, 10
MCL 600.2912d	10
MCL 600.5656	16
MCR 7.212(H)	2

Other

Black's Law Dictionary (6th ed), p 54	13
Const 1963 art 3, § 8	10, 13, 14, 23
Const 1963, art 6, § 1	6, 14

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant-appellants James H. Deering, James H. Deering, D.O., P.C., and Russell H. Tobe, D.O. (“appellants”) seek leave to appeal the Court of Appeals’s June 9, 2005 opinion on reconsideration¹ (“*Apsey II*”) from the Court’s previous April 19, 2005 opinion² (“*Apsey I*”). *Apsey II* reaffirmed *Apsey I*’s legal conclusion but determined that the effect of its decision would be prospective only, depriving appellants of the benefit of the meritorious legal position they have argued and preserved throughout this case.

As a result, appellants ask this Court to affirm *Apsey II* in part but reverse the prospective limitation to allow appellants to receive the relief to which they are legally entitled, and affirm the trial court’s original decision granting summary disposition for appellants because plaintiff-appellants Sue and Robert Apsey’s (“appellants”) Affidavit of Merit (“AOM”) lacked the required certification of the foreign notary’s authority. This Court could accomplish this result by peremptory reversal, by a per curiam opinion, or by granting leave to appeal.

¹ *Apsey v Memorial Hospital (On Reconsideration)*, ___ Mich App ___; ___ NW2d ___ (2005) (Exhibit A).

² *Apsey v Memorial Hospital*, ___ Mich App ___; ___ NW2d ___ (2005) (Exhibit B).

STATEMENT OF QUESTION INVOLVED

- I. **SHOULD THIS COURT REVERSE IN PART THE COURT OF APPEALS DECISION IN *APSEY II* BECAUSE THE *APSEY II* COURT LACKED THE AUTHORITY TO ISSUE A PURELY PROSPECTIVE ADVISORY OPINION, BECAUSE THERE WAS NO LEGAL BASIS FOR PROSPECTIVE APPLICATION WHEN NO AUTHORITY EXISTED SUPPORTING APPELLEES' POSITION AND WHEN THE DECISION BOUND ALL SUBSEQUENT LITIGANTS, AND BECAUSE THE COURT OF APPEALS WAS POWERLESS TO ACT ON A CASE THAT HAD NEVER BEEN "COMMENCED?"**

Appellees would answer "No."

Appellants answer "Yes."

STATEMENT OF FACTS & PROCEEDINGS

The relevant facts are not in dispute, and very few facts are actually relevant to the limited scope of this application. Briefly, appellees filed a complaint alleging medical malpractice against appellants in November 2001. Appellees filed their complaint with an Affidavit of Merit (“AOM”) that had been verified by a Pennsylvania notary public but without the certification of the notary’s authority that Michigan law requires. Appellants moved for summary disposition in the trial court, arguing that appellees’ AOM was defective and failed to actually “commence” the action. The trial court granted appellants’ motion, holding that appellants’ failure to provide the required certification rendered their AOM a nullity.

APSEY I

Appellees filed a claim of appeal with our Court of Appeals, which first affirmed the trial court in *Apsey I*. First, the *Apsey I* Court confirmed that affidavits verified by foreign notaries required a § 2102 certification:

In 1924, our Supreme Court reiterated that there is a legislative requirement that, where an affidavit is submitted to a court, and authenticated by an out-of-state notary public, in order for the court to consider the affidavit, the signature of the sister-state notary public had to be certified by the clerk of the court of record in the county where the affidavit was executed. [*In re Alston's Estate*, 229 Mich 478, 481-482; 201 NW 460 (1924).] Similarly, MCL 600.2102, effective in 1963, states that “where by law the affidavit of any person residing in another state . . . is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated” Subsection (4) specifies that an affidavit taken in a sister state “may be taken before . . . any notary public . . . authorized by the laws of such state to administer oaths therein,” adding, “The signature of such notary public . . . shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.” This language closely mirrors that construed by our Supreme Court in *In re Alston's Estate*, [229 Mich at 481; see also *Wallace v Wallace*, 23 Mich App 741, 744-745; 179 NW2d 699 (1970); **Exhibit B, slip op pp 2-3; emphasis added.]**

Because § 2912d and § 2102 are coextensive, the *Apsey I* Court next recognized that in order to properly be an “affidavit,” an AOM verified by a foreign notary must contain a § 2102 certification. If it does not, the AOM is a nullity and fails to properly commence the action. (**Exhibit B, slip op pp 4-5**, citing *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), and *VandenBerg v VandenBerg (After Remand)*, 253 Mich App 658, 662; 660 NW2d 341 (2002)). As a result, the *Apsey I* Court affirmed the trial court’s dismissal of the appellees’ action since it was never properly commenced. Moreover, since the action was never properly commenced within the applicable limitation period, the action was time-barred.

Instead of seeking leave to appeal to this Court, appellees filed a motion for reconsideration in the Court of Appeals on May 10, 2005. Appellees sought to buoy their position by soliciting amicus curiae briefs from the Michigan Trial Lawyers Association, Citizens for Better Care, the State Bar of Michigan, the State Bar of Michigan-Negligence Section, the State Bar of Michigan-Elder Law section’s, United Auto Workers, the Michigan Department of Community Health, and the Michigan State Medical Society, all of which were filed almost a year and a half after the time for such briefs under MCR 7.212(H). Appellants contested both appellees’ motion for reconsideration and the proposed amici’s motions to participate. Nevertheless, the Court of Appeals vacated its original opinion and granted reconsideration on June 2, 2005. (Exhibit C, Order granting reconsideration, 6/2/05).

APSEY II

The *Apsey II* Court did not seek further briefing or argument, but simply issued a second opinion on June 9, 2005. Importantly, the *Apsey II* Court reaffirmed the basic

holding of *Apsey I*: that in order to properly be an “affidavit,” an AOM verified by a foreign notary must contain a § 2102 certification. If it does not, the AOM is a nullity and fails to properly commence the action. **(Exhibit A, slip op, pp 4-5)**. Moreover, the *Apsey II* Court reiterated that because the action was never properly commenced within the applicable limitation period, the action was time-barred. **(Exhibit A, slip op, p 6)**. *Apsey II* therefore did not question or reconsider any of the underlying aspects of the *Apsey I* decision, and concluded that all AOMs verified by foreign notaries must contain a § 2102 certification to be effective.

The *Apsey II* Court properly refused to reconsider these fundamental legal issues, stating that “these questions are best left for the Legislature.” **(Exhibit A, slip op, p 9)**. The Court diverged from *Apsey I*, however, on the question of whether this holding would apply to the present facts based on “fairness” and “public policy”:

In essence the question before this Court is an issue of first impression whose resolution, because of the URAA, was not clearly foreshadowed. **Our decision is based on a law, MCL 600.2102, requiring a special certification for out of state notarial acts, which has either been overlooked by practitioners in medical malpractice cases, or, more likely, practitioners have been under the impression that the URAA, enacted subsequent to MCL 600.2102, was the applicable statute and that special certification was not required.** [Appellees’] counsel raised a concern at oral argument with regard to the significant impact this holding could have on medical malpractice cases in Michigan because of the fact that a majority of affidavits of merit for medical malpractice cases come from out of state and that practitioners have relied on the URAA validation requirements for the out of state notarial acts. Amici Curiae have also raised concerns regarding practitioner’s beliefs that the less restrictive URAA requirements for verification of notarial acts was sufficient verification, and the significant impact this would have on medical malpractice claims, which in large part are supported by affidavits of merit from out of state doctors. Apparently, there has been confusion in the legal community as to whether the more relaxed standards of the URAA applied. **In light of the apparent reliance on the URAA by the legal community, we believe the justice requires a prospective application.** See [*Gladych v New Family Homes*,

Inc, 468 Mich 594, 606; 664 NW2d 705 (2003).] **Retroactive application would result in the dismissal of a large number of otherwise meritorious medical malpractice claims.** Our Supreme Court has recognized that “resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy.” *Riley v C & H Indus*, 431 Mich 632, 644-645; 433 NW2d 787 (1988). **Fairness and public policy both support a prospective application because a serious injustice could result from a retroactive application, and prospective application of the ramifications for the failure to provide the MCL 600.2102(d) certification accomplishes a “maximum of justice” under the presented circumstances.** [*Lindsey v Harper Hospital*, 455 Mich 56, 69; 564 NW2d 861 (1997).] [**Exhibit A, slip op, pp 7-8; emphasis added.**]

The *Apsey II* Court also relied on this Court’s decision in *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004), which held that, under the particular facts of that case, it would be unjust to dismiss the plaintiff’s claim as time-barred. **(Exhibit A, slip op, p 8).** The *Apsey II* Court then looked to the “purpose” of the AOM requirement and held that the equities dictated that appellees be allowed to proceed in this case despite the fact that it had never been commenced:

The equities in this case dictate that we find [appellees’] claims are not time barred. But for the certification, [appellees’] complaint would not have been dismissed. A sound affidavit of merit exists, the only problem being the failure to certify as required by MCL 600.2102(4) prior to the expiration of the statute of limitations. The statutory purpose for medical malpractice affidavits of merit is to detour frivolous medical malpractice claims. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). This purpose was served in the present case as [appellants] were put on timely notice of the claims with an affidavit of merit that met every requirement, except the out of state notarial act had not been properly certified. Like in *Bryant*, the “procedural features of this case dictate” that [appellees] should be permitted to proceed with the medical malpractice claims. *Bryant, supra* at 433. Thus, the equities also weigh in favor of [appellees’] action not being barred by the statute of limitations. [**Exhibit A, slip op, pp 8-9; emphasis added.**]

The *Apsey II* Court, therefore, reversed the trial court:

For the above stated reasons, reversing the trial court’s order granting [appellants’] motions for summary disposition and allowing [appellees’] claims

to proceed best serve justice and equity. [Appellees], in this case, have already presented the proper certification. With regard to all medical malpractice cases pending where plaintiffs are not in compliance with MCL 600.2102(4), on the basis of justice and equity, plaintiffs can come into compliance by filing the proper certification. [**Exhibit A, slip op, p 9.**]

Appellants now seek reversal of the *Apsey II* Court's decision regarding the application of its own holding, either by peremptory means or through leave to appeal.

46 NW 436 (1890), and *In re Alston's Estate*, 229 Mich 478; 201 NW 460 (1924), decisions by this Court that have never been questioned or overruled, both held that § 2102's certification requirement applied under similar circumstances. See also *Sellers v Goldapper*, unpublished opinion per curiam of the Court of Appeals, dated November 4, 1997 (Docket No. 196914) (**Exhibit D**) (applying § 2102 to nullify an affidavit).

Essentially, the *Apsey II* Court allowed attorneys to negate § 2102 by complaining to the Court that the legal community was not aware of it. To say the least, this is a novel holding, and paves the way for “attorney legislation” to replace “judicial legislation.” It is a well-established rule that “ignorance of the law cannot prevent its enforcement,” *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 466; 646 NW2d 455 (2002), but this rule apparently does not apply to attorneys or special interest groups. Indeed, under *Apsey II*, when a statute is particularly troublesome, it now possible to “wish” the statute away if a party can gather a large enough group of attorneys to file their wishes in the form of amicus briefs.

The *Apsey II* Court's decision is little more than a failure to withstand the political pressure generated by the appellees and their amici supporters after the Court of Appeals released *Apsey I*. Instead of appealing the *Apsey I* decision to this Court, appellees determined that they could obtain more effective relief by inundating the Court of Appeals with proposed amicus briefs, most of which were little more than cries of outrage and attempts to obtain judicial nullification of § 2102 from the Court of Appeals.

The *Apsey II* Court's solution was to reaffirm its initial holding but to refuse to apply it to the parties before the Court, or to any other case currently pending in this state. This Court has recently recognized that such “purely prospective” decisions are advisory opinions in *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004):

. . . . **there is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions.** The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor--and, then, only "on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963 art 3, § 8. [Emphasis added.]

Such "prospective" opinions do not bind the litigants before the Court, and are arguably not a valid exercise of judicial power. This especially true in the Court of Appeals, which is not authorized to issue advisory opinions under any circumstances.

The implication of *Apsey II*, if this Court allows it to stand, is clear: a party can induce the Court of Appeals to nullify its own decision by moving for reconsideration and flooding the Court with criticism from influential commentators. This is not only repugnant to the concept of an independent judiciary, it erodes our state's entire judicial process. Michigan residents cannot have faith that "independent" judges will decide their disputes when those judges can be so easily swayed by the concentrated efforts of interest groups, as was the case here.

Moreover, negating the effect of an opinion by limiting its application to future litigants only destroys the fundamental premise of the courts as arbitrators of disputes. What did appellants gain by prosecuting their case to this point? Nothing, if the Court of Appeals decision is allowed to stand. No litigant will undergo the time and expense of the appellate process if the ultimate decision may not affect her rights. To do so would be a waste of resources.

For these reasons, appellants submit that this case presents issues of major significance that this Court should address, either by granting leave or other means of providing relief.

ARGUMENT

Appellants limit the scope of this application to the *Apsey II* Court's decision to limit its decision to have purely prospective application only. As a result, appellants will not address the issues underlying the *Apsey II* Court's decision— the interplay of MCL 600.2912d's AOM requirement and MCL 600.2102's certification requirement, and the effect of the URAA on both of these statutes – below. The sole issue before this Court is whether the *Apsey II* Court's manufactured limitation on the prudential effect of its own decision is valid or sound. Appellants submit that it is neither, and ask this Court to reverse the *Apsey II* Court's decision in this limited respect and hold that the decision – at a minimum – must bind the parties to this case.

- I. **THIS COURT SHOULD REVERSE IN PART THE COURT OF APPEALS DECISION IN *APSEY II* BECAUSE THE *APSEY II* COURT LACKED THE AUTHORITY TO ISSUE A PURELY PROSPECTIVE ADVISORY OPINION, BECAUSE THERE WAS NO LEGAL BASIS FOR PROSPECTIVE APPLICATION WHEN NO AUTHORITY EXISTED SUPPORTING APPELLEES' POSITION AND WHEN THE DECISION BOUND ALL SUBSEQUENT LITIGANTS, AND BECAUSE THE COURT OF APPEALS WAS POWERLESS TO ACT ON A CASE THAT HAD NEVER BEEN "COMMENCED."**

As noted, this Court has recently recognized that there is "a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *Hathcock*, 471 Mich at 484 n 98. Such opinions, like *Apsey II*, do not affect the rights of the litigants before the Court, and therefore are arguably not a valid exercise of judicial power. While this Court has limited authority to issue such opinions under Const 1963 art 3, § 8, the Court of Appeals has absolutely no authority to do so, and *Apsey II* therefore exceeds the Court of Appeals's constitutional authority. At the very least, then, *Apsey II* must apply to appellees, even if

it does not apply retroactively to other cases, in order to be a proper exercise of the judicial power vested in the Court of Appeals.

Even if the Court of Appeals had the power to issue such a purely prospective advisory opinion, it could not have done so under these circumstances. *Apsey II* did not announce a new legal rule, did not overrule existing precedent, and did not create a distinct class of litigants who would be denied a remedy. As a result, the *Apsey II* Court had no basis for purely prospective application under *Hathcock*, 471 Mich at 484 n 98, *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), and their predecessors.

Finally, appellees' failure to properly "commence" this action by filing an AOM with the required 2102 certification renders this entire case a nullity. Neither the trial court nor the Court of Appeals ever acquired jurisdiction over this particular case because appellees' defective AOM failed to "commence" the case within the meaning of MCL 600.1901. Once the *Apsey II* Court determined that appellees had never actually "commenced" the action, the Court had no authority to consider equity because there was no case to which equitable jurisdiction could attach. The Court lacked the ability to do anything but dismiss the case, and it erred when it failed to do so.

This Court should therefore reverse in part the *Apsey II* Court's decision, hold that the Court of Appeals lacked power to issue a purely prospective advisory opinion, and that *Apsey II* must apply to the parties, or remand this case back to the Court of Appeals for a judgment so stating. In the alternative, this Court should reverse the purely prospective limitation on *Apsey II* and hold that the decision is entitled to at least limited retroactive effect. Moreover, this Court should recognize that the *Apsey II* Court lacked the power to

do anything but dismiss this case once it determined that appellees failed to “commence” the action. Appellants will address each of these arguments in greater detail below.

A. Standard of review.

This Court “review[s] de novo lower court decisions on a motion for summary disposition.” *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003).

B. *Apsey II* must apply to appellees, even if it does not apply retroactively to other litigants, or the decision will be an advisory opinion that the Court of Appeals was without power to render.

Const 1963, art 6, § 1 provides that “the judicial power of the state is vested exclusively in one court of justice” This Court has interpreted the phrase “judicial power” to mean that the Court may only issue opinions that are binding on the litigants before the Court. See *In re Certified Question*, 472 Mich 1225 (Young, J., concurring) (2005) and cases cited therein. For example, in *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884), this Court stated that: “The exercise of judicial power in its strict legal sense can be conferred only upon courts named in the Constitution. **The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.**” (Emphasis added).³

On the basis of this constitutional limitation on “judicial power,” this Court recently reiterated that purely prospective opinions were strongly disfavored and constitutionally questionable in *Hathcock*, 471 Mich at 484 n 98:

³ See also *Underwood v McDuffee*, 15 Mich 361, 368 (1867) (“The judicial power, even when used in its widest and least accurate sense, involves the power to “hear and determine” the matters to be disposed of”)

. . . . there is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions. The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor--and, then, only "on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963 art 3, § 8. [Emphasis added.]

This Court has thus recognized that purely prospective opinions are essentially advisory opinions⁴ because these opinions do not bind the litigants before the Court. This Court has limited authority to issue such opinions under Const 1963 art 3, § 8, but that provision does not apply to the Court of Appeals.⁵ Indeed, the Court of Appeals has *absolutely no authority*, constitutional or otherwise, allowing it to issue advisory opinions. *Judicial Attorneys Ass'n v Michigan*, 228 Mich App 386, 427; 579 NW2d 378 (1998), *aff'd* in part and vacated in part 460 Mich 590; 597 NW2d 113 (1999) (Markman, J., dissenting) ("This Court [of Appeals] does not to have the power to issue advisory opinions and ought not to arrogate this extraordinary authority to itself. See Const 1963, art 3, § 8.").

Therefore, to be a valid exercise of the Court of Appeals's power, *Apsey II* must, at a minimum, apply to the parties that were before the Court. As written, however, *Apsey II* is an advisory opinion that by its own terms does not apply to the litigants before the

⁴ Black's Law Dictionary (6th ed), p 54, defines "advisory opinion" as "an interpretation of the law without binding effect."

⁵ Const 1963 art 3, § 8 provides that "[e]ither house of the legislature or the governor **may request the opinion of the supreme court** on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." (Emphasis added). There is no parallel provision for the Court of Appeals.

Court, or any other litigants with currently pending cases. This exceeds the authority of the Court of Appeals under Const 1963, art 6, § 1, and Const 1963, art 3, § 8, and is an invalid exercise of judicial authority.⁶ As a result, this Court should reverse in part the Court of Appeals's decision in this case and either hold that *Apsey II* must apply to the parties or remand this case back to the Court of Appeals for a judgment so stating.

C. Alternatively, there is no justification for prospective application here under any circumstances because *Apsey II* did not change the law or overrule existing authority. Therefore, even if the *Apsey II* Court had the power to issue a purely prospective advisory opinion, this Court should reverse its attempt to do so here.

Even if the Court of Appeals somehow had the authority to issue a purely prospective advisory opinion like *Apsey II*, it still clearly erred when it did so under the facts and circumstances present here. Even when constitutionally permissible, this Court disfavors purely prospective opinions. *Hathcock*, 471 Mich at 484 n 98. As a result, this Court has recognized that “complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.” *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). Because none of the circumstances present here would allow for purely prospective application under this

⁶ Of course, the Court of Appeals has the ability to apply other decisions prospectively because such an opinion binds the litigants before it. See, e.g., *Hall v Novik*, 256 Mich App. 387; 663 NW2d 522 (2003) (considering the precedential effect of *Crego v Coleman*, 463 Mich 248, 252; 615 NW2d 218 (2000)); *Johnson v White*, 261 Mich App 332, 336; 682 NW2d 505 (2004) (considering the precedential effect of *DeRose v DeRose*, 249 Mich App 388; 643 NW2d 259 (2002), *aff'd* 469 Mich 320; 666 NW2d 636 (2003); *Ousley v McLaren*, 264 Mich App 486, 493; 691 NW2d 817 (2004) (considering the precedential effect of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

Court's precedent, the *Apsey II* Court's application of that measure here is improper; *Apsey II* should be given full, or in the alternative, limited retroactive effect.

"The general rule is that judicial decisions are given complete retroactive effect." *Hyde*, 426 Mich at 240; *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 647; 433 NW2d 787 (1988). *Lincoln v GMC (On Remand)*, 231 Mich App 262, 267; 586 NW 2d 241 (1998); *Gladych v New Family Homes, Inc*, 468 Mich 594, 607; 664 NW2d 705 (2003). Prospective effect is reserved for legislative amendments. *Riley*, 431 Mich at 647. The only exceptions are simply inapplicable here because *Apsey II* did not even announce a new rule, much less overrule an old one.

1. There is "no discrete class of litigants" who would be denied relief if *Apsey II* were retroactive.

Apsey II did not involve the application of a new act or statute, as did this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). In *Pohutski*, this Court gave its decision prospective effect because of "**unique circumstances**":

In *Pohutski*, the Legislature had passed 2001 PA 222 providing a remedy for damages or physical injuries caused by a sewage disposal system event. 2001 PA 222 did not apply retroactively. Therefore, we held that prospective application was appropriate because, otherwise, plaintiffs in pending cases would have been part of a discrete class of litigants denied relief, **as those who came before received relief under *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), and those who came after would receive relief under the statute.** [*Gladych*, 468 Mich at 606 n 6; emphasis added.]

Thus, when all litigants before and after the *Pohutski* decision would be entitled to a remedy, this Court declined to refuse that remedy to one "discrete class of litigants" only.

This Court has noted that these unique circumstances are not present when “*all subsequent litigants* (after the effective date of this opinion) will be governed by this case. Therefore, **the extreme measure of pure prospective application is unnecessary and inappropriate** because there is no discrete class of litigants who would be denied relief.” *Gladych*, 468 Mich at 606 n 6 (italics original, emphasis added).

Unlike *Pohutski*, there has been no legislative change here, and all subsequent litigants will be bound by *Apsey II*. So “the extreme measure of pure prospective application is unnecessary and inappropriate because there is no discrete class of litigants who would be denied relief.” *Id.* The *Apsey II* Court’s use of prospective application under these circumstances therefore contradicts this Court’s mandate in *Gladych*, 468 Mich at 606 n 6.

2. Appellees had no precedent or other authority to rely on to justify their ignorance of § 2102.

Likewise, this is not a situation where appellees, or medical malpractice plaintiffs generally, had an existing case to rely on that would justify an AOM with no certification. In such cases, decisions may be given limited retroactive effect, as in *Gladych*, 468 Mich at 607. In *Gladych*, our Supreme Court overruled *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971),⁷ because *Buscaino* was inconsistent with the plain language of the then-existing version of MCL 600.5656. The *Gladych* Court only applied its ruling to cases where the issue had been preserved because parties could have properly relied on *Buscaino*.

⁷ This Court had already overruled *Buscaino* in part in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

The concerns in *Gladych* are absent here. Section 2102 has always been in effect in some form since 1846, and the decisions applying it, *Berkery*, 82 Mich at 167-168, and *In re Alston's Estate*, 229 Mich at 481-482, have never been overruled or questioned. See *Sellers, supra*. There has been no precedent that litigants could rely on that overrode the plain language of § 2102, as *Buscaino* did the plain language of § 5856.⁸ Moreover, *Gladych* affected not just one class of cases, as *Apsey II* does, but *all civil cases in Michigan* where the statute of limitations was an issue. Thus, *Apsey II* has a far more restrictive holding than did *Gladych*, and parties had a much more substantial basis to ignore the plain language of § 5856 before *Gladych* than appellees, or any other medical malpractice plaintiffs, had to ignore § 2102 before *Apsey II*.

The *Hathcock* Court also refused to limit its decision to prospective application even though it overruled another oft-cited decision, *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981):

In the twenty-three years since our decision in *Poletown*, it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous, interpretation of [Const 1963] art 10, § 2. Indeed, Wayne County's course of conduct in the present case was no doubt shaped by *Poletown's* disregard for constitutional limits on the exercise of the power of eminent domain and the license that opinion appeared to grant to state and local authorities.

Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by

⁸ Particularly, in this case appellees did not even raise the specter of reliance on the URAA until they moved for reconsideration of the trial court's decision. Surely, if they had been relying on the URAA to override § 2102 all along, they would have so asserted in their initial response to appellant's motion.

our Constitution since it took effect in 1963. [*Hathcock*, 471 Mich at 484; emphasis added.]

Even when overruling heavily-relied upon authority, then, this Court is extraordinarily reluctant to issue prospective decisions. It is therefore impossible to justify the *Apsey II* Court's decision to do so when all of the factors that might justify prospective application are starkly absent.

3. If not full retroactive effect, *Apsey II* must be given at least limited retroactive effect to cases where the issue has been raised and preserved.

Michigan courts have recognized a more limited approach to retroactivity when the decision at issue will have a ripple effect. *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997). For example, in *Gladych*, 468 Mich at 607, this Court noted that overruling *Buscaino* would affect many ongoing cases because of the:

extensive reliance on *Buscaino's* interpretation of § 5856. Parties have undoubtedly relied on *Buscaino's* erroneous interpretation when calculating filing deadlines regarding limitations periods, and courts have relied on *Buscaino's* erroneous interpretation when ruling on motions regarding limitations periods.

In order to ameliorate the severity of the decision, the *Gladych* Court gave it “limited retroactive application, **applying only to cases in which this specific issue has been raised and preserved.**” (Emphasis added).

Appellants recognize the arguments that *Apsey II* would potentially have a similar ripple effect on existing cases if it were retroactive. Even though, as noted above, the scope of this case is much narrower than *Gladych*, appellants concede that the concerns regarding reliance in *Apsey II* and *Gladych* are similar, and as a result, it would be

reasonable to give *Apsey II* limited retroactive effect, applying it only to cases in which this specific issue has been raised and preserved, such as this case.

Regardless of whether *Apsey II* is given complete or limited retroactive application, it is indisputable that the Court of Appeals's decision to give its opinion purely prospective application was clear error under *Hathcock*, 471 Mich at 484 n 98, *Pohutski*, 465 Mich at 683, and *Gladych*, 468 Mich at 607. The *Apsey II* Court's deviation from the standards set by this Court's precedent is so obvious that granting leave is unnecessary. As a result, this Court should peremptorily reverse this aspect of *Apsey II*, or alternatively, grant leave to consider this issue.

D. Because appellees failed to “commence” this action, the action itself is a nullity, and there was nothing over which the *Apsey II* Court could exercise jurisdiction. This Court should therefore hold that the *Apsey II* Court was powerless to do anything but dismiss this case.

On a more fundamental level, the *Apsey II* Court was powerless to do anything but dismiss this case once it determined that appellees failed to actually “commence” this medical malpractice action under *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000). The Court failed to recognize that appellees' failure to “commence” this action meant that there was no “case” before it at all. Nevertheless, the Court presumed it had equitable jurisdiction, and held that “the equities also weigh in favor of [appellees'] action not being barred by the statute of limitations.” (**Exhibit A, slip op, p 9**).

The *Apsey II* Court's actions betray a misunderstanding of what appellees' failure to “commence” this action means. It means that *the courts had no power to hear this particular case because they never acquired jurisdiction*. Because there is no jurisdiction,

the *Apsey II* Court was unable to consider the application of equity, justice, or any other such doctrine because there is no “case” to which they could apply.⁹

As this Court has held, filing a complaint without a proper AOM is “insufficient to commence [the] action.” *Scarsella*, 461 Mich at 550. The term “commence” implies that there is a fundamental failure to truly bring the action. MCL 600.1901 provides that “[a] **civil action is commenced by filing a complaint with the court.**” (Emphasis added). Thus, if the action is never “commenced” because the AOM was defective or not filed at all, *there is no civil action*. The action itself is a nullity, and it can be said the court never acquires jurisdiction over the case, or alternatively, that jurisdiction never attaches. *Haenlein v Saginaw Trades Council*, 361 Mich 263, 270; 105 NW2d 166 (1960) “(**Having duly acquired jurisdiction -- conferred by the plaintiff's bill and the defensive pleadings as filed . . .**)” (emphasis added); *Millard v Lenawee Circuit Judge*, 107 Mich 134, 135; 64 NW 1046 (1895) (dealing with an affidavit requirement for garnishments) (“**Where the affidavit is made upon the same day with the commencement of suit, the court acquires jurisdiction.**”) (emphasis added).

⁹ This is distinct from the situation in *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004), where the plaintiffs had filed complaints alleging ordinary negligence instead of medical malpractice, and this Court determined that the claims sounded in malpractice but allowed them to proceed as a matter of equity. In *Bryant*, the courts had acquired jurisdiction over the particular case because the plaintiff filed a valid complaint, even though it sounded in the wrong theory. The defendants in that case may have been entitled to summary disposition for failure to state a claim, but the basic jurisdictional requirements were met, and this Court therefore had jurisdiction to consider the equities of the case.

The authorities refer to this concept as jurisdiction *over the particular case*, as opposed to subject-matter or personal jurisdiction. For example, in *Browning v Walters*, 620 NE2d 28, 31 (CA Ind, 1993), the Court of Appeals of Indiana explained that:

Jurisdiction is comprised of three elements: (1) jurisdiction of the subject matter; (2) jurisdiction of the person; and **(3) jurisdiction of the particular case.** *Harp v. Indiana Department of Highways* (1992), Ind. App., 585 N.E.2d 652, 659. **Jurisdiction of the particular case means "the right, authority, and power to hear and determine a specific case within that class of cases over which a court has subject matter jurisdiction."** *Id.* (original emphasis) (quoting *City of Marion v. Antrobus* (1983), Ind. App., 448 N.E.2d 325, 329). **A court can have subject-matter jurisdiction over a class of cases and not have jurisdiction over a particular case due to the facts of that case.** *Id.* A party's failure to comply with the Trial Rules can affect the trial court's jurisdiction over a particular case but not the court's subject-matter jurisdiction. See *id.* at 659 (failure to name proper party in caption of complaint pursuant to Trial Rule 10(A)).

One of the most commonly cited secondary authorities, the American Jurisprudence Encyclopedias, have also recognized this requirement:

Caution: **A court can have subject matter jurisdiction over a class of cases and not have jurisdiction over a particular case due to the facts of that case. For example, a party's failure to follow procedural rules can affect the trial court's jurisdiction over a particular case, but not the court's subject matter jurisdiction.** [20 Am Jur 2d, COURTS, § 55; emphasis added.]

This Court has also recognized this requirement, although it did not give it a specific name, in *Fox v Martin*, 287 Mich 147, 152; 283 NW 9 (1938). In *Fox*, the appellants sought to enforce a mechanic's lien that was more than one year old, even though a statute provided that the lien only lasted one year unless a party sued within that time. This Court explained that the trial court could not acquire jurisdiction when the cause of action itself no longer existed:

There was, therefore, no lien in existence at the time the bill was filed on which foreclosure could operate. The subject-matter, for which

foreclosure was provided by statute, had vanished. The court was not authorized by law to act in proceedings to foreclose, where the lien had disappeared; and because foreclosure of a mechanics' lien is purely statutory, **the court could acquire no jurisdiction where on the face of the bill of complaint, it appeared that the rights sought to be enforced, were not only not provided for in such statute but were nonexistent.**

* * *

“The source and general extent of jurisdiction are to be found in the inherent powers of the court or the positive provisions of the law. It is there we must look to see whether the question or matter in controversy is one which the court may in any case entertain. **But it is not enough that the court's powers may be found broad enough in the abstract to cover the class of litigation to which the case in question belongs. Mere possession of power to act in respect to a specific subject-matter is of no consequence unless that power is properly invoked.** For jurisdiction of the subject-matter of a particular case is something more than the constitutional or statutory power to entertain cases of the general class to which the one in hand belongs; it is that power called into activity, not by the court of its own motion for that would ordinarily be insufficient, but by some act of the suitor concerned and in some mode recognized by law.” 1 Freeman on Judgments (5th Ed.), p. 677, § 338. [*Fox*, 287 Mich at 152; emphasis added].

This Court thus recognized in *Fox* that parties must properly invoke the court's jurisdiction through their acts, and that is exactly what appellees failed to do when they filed a defective AOM. Although the trial court would have had subject-matter, and most likely personal, jurisdiction over this case had it been “commenced,” the “[m]ere possession of power to act in respect to a specific subject-matter is of no consequence unless that power is properly invoked.” *Id.* at 152.

As a result, the case itself is a nullity, and once the Court of Appeals so concluded, there was nothing else left for it to decide. There was nothing to apply, nothing to restrict,

nothing at all. The specific facts have no bearing because they were not properly before the court. Equity is not even a consideration because there is nothing to which equitable jurisdiction can attach. The Court of Appeals only had the power to dismiss the case, nothing more. The *Apsey* // Court erred when it exceeded that power, and this Court must reverse this error as well, or alternatively, grant leave to consider it.

CONCLUSION

The Court of Appeals exceeded its authority in this case when it gave *Apsey II* purely prospective effect because “such rulings are, in essence, advisory opinions.” *Hathcock*, 471 Mich at 484 n 98. While this Court has limited authority to issue such opinions under Const 1963 art 3, § 8, the Court of Appeals has absolutely no authority to do so, and *Apsey II*, therefore, exceeds the Court of Appeals’s constitutional authority. At the very least, this Court must order the Court of Appeals to apply *Apsey II* to appellees, even if it does not apply retroactively to other cases, in order to be a proper exercise of the judicial power vested in the Court of Appeals. This Court could do so in a peremptory ruling, thereby alleviating the need to grant leave to appeal or for further review.

Alternatively, the Court of Appeals clearly erred by issuing a purely prospective decision when *Apsey II* merely reaffirmed the existing authority. The Court of Appeals did not announce a new legal rule, did not overrule existing precedent, and did not create a distinct class of litigants who would be denied a remedy. As a result, the *Apsey II* Court had no basis for purely prospective application under *Hathcock*, 471 Mich at 484 n 98, *Pohutski*, 465 Mich at 683, *Gladych*, 468 Mich at 607, or any of this Court’s recent decisions regarding prospectivity. Moreover, neither the trial court nor the Court of Appeals ever acquired jurisdiction over this particular case because appellees’ defective AOM failed to “commence” it within the meaning of MCL 600.1901. Once the *Apsey II* Court determined that appellees had never actually “commenced” the action, the Court lacked the ability to do anything but dismiss the case, and it erred when it failed to do so.

This Court should therefore reverse in part the *Apsey II* Court’s decision, hold that the Court of Appeals lacked the power to issue a purely prospective advisory opinion, and

apply *Apsey II* to the parties, or remand this case back to the Court of Appeals for a judgment so stating. In the alternative, this Court should reverse the purely prospective limitation on *Apsey II* and hold that the decision is entitled to at least limited retroactive effect. Finally, this Court should recognize that the *Apsey II* Court lacked the power to do anything but dismiss this case once it determined that appellees failed to “commence” the action.

Respectfully submitted,

Willingham & Coté, P.C.
Attorneys for Appellees

Dated: July 21, 2005

By: 

Michael W. Stephenson (P48977)
Matthew K. Payok (P64776)
333 Albert Avenue, Suite 500
East Lansing, MI 48823
(517) 351-6200
Fax: (517) 351-1195

and

Hackney, Grover, Hoover & Bean

Randy J. Hackney (P28980)
Loretta B. Subhi (P42039)
1715 Abbey Lane, Suite A
East Lansing, MI 48823
(517) 333-0306